In the Supreme Court

OF THE

United States

OCTOBER TERM, 1940

No. 307

ROYAL INSURANCE COMPANY, LTD.
(a corporation),
Petitioner,

vs.

ROBERT A. SMITH,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

Subject Index

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To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

The petition of Royal Insurance Company, Ltd., a corporation, petitioner above named, respectfully shows:

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

This is an action at law upon a valued policy of fire insurance covering upon a leasehold, as follows (R. 221):

> "$15,000.00—*On assured's Leasehold Interest* in property located on the Beach Road on the westerly shore of Belvedere Cove * * *.
>
> *This insurance is predicated upon lease to land* above described held by the assured from the Trustees of the City of Belvedere, California, to which there is paid a monthly rental of three dollars ($3.00).
>
> If, by fire occurring during the term of this policy, the dwelling house owned and occupied by the assured situate on the above described land is destroyed and thus *cause the cancellation of lease* in accordance with the terms and conditions [sic], * * * in event the property cannot be *re-leased,* then the whole sum of this insurance shall be payable * * *.
>
> It is understood and agreed that there shall be no loss payable under this policy except as a result of fire of sufficient extent to cause *the cancellation of the lease.*" (Emphasis ours throughout.)

A brief consideration of the prior proceedings in the cause is essential at this point.

The prior proceedings.

The original complaint alleged that respondent's leasehold interest arose out of the provisions of the deed by which the town acquired title to the beach

property; this deed is attached to the present complaint as an exhibit (R. 17-26). The first trial resulted in judgment for respondent, which was reversed on appeal by the Circuit Court (77 Fed. (2d) 157, 159) on the ground that "no interest subsisted in plaintiff [respondent] by the terms of the deed alone", and therefore the complaint did not state a cause of action. With regard to the evidence, the Circuit Court there said (p. 158):

> "The soundness of this proposition of pleading may be tested by reference to the proof adduced at trial. No scintilla of evidence offered there gave indication of the existence of any express agreement of lease to Smith [respondent] or any of his predecessors."

Thereafter, respondent three times amended his complaint. The trial Court sustained a demurrer to the present complaint without leave to amend. Respondent appealed, and the Circuit Court (93 Fed. (2d) 143) reversed the resulting judgment. Petitioner's request for certiorari was denied (303 U. S. 656, 58 S. Ct. 759, 82 L. Ed. 1115).

A second trial resulted in judgment for petitioner (26 Fed. Supp. 238; R. 60, 93). On appeal, the Circuit Court (111 Fed. (2d) 667; R. 366-76) reversed this judgment. Petition for rehearing was denied (R. 377); and petitioner now prays certiorari.

The issues.

The second opinion of the Circuit Court (which was addressed entirely to the pleadings, there being no

evidence then before the Court), adequately summarizes the allegations of the present complaint (93 Fed. (2d) 143, 144-6):

> "Essentially, his [respondent's] third pleading *alleges* that in the year 1884 one Keil, his predecessor in interest, erected on the westerly shore of Belvedere cove certain structures known as Keil Cottage. * * * After the erection of the improvements a dispute arose between him [Keil] and the Belvedere Land Company concerning the ownership of the land. The parties composed the dispute in a *written agreement* which * * * has been *lost or destroyed.* In this instrument Keil transferred his interest in the fee to the Belvedere Land Company, and the latter in turn * * * agreed to allow him, *as its lessee,* * * * to have the exclusive possession and use of the ground *until such time as the improvements should be destroyed by fire, or otherwise.* In 1897 the Belvedere Land Company conveyed this parcel to the Town of Belvedere for use as a public beach. The town, it is alleged, *took with knowledge* of Keil's existing rights. * * * The ground rent [three dollars monthly, as allegedly specified in the said agreement] continued to be paid * * * by Keil and his successors in interest, including plaintiff, down to May, 1932, when the Keil cottage was destroyed by fire. * * *
>
> By intermediate conveyances, plaintiff in October, 1928, became the owner of all the right, title, and interest of Keil in the real property and improvements. There are *averments* * * * that there was an *understanding* between plaintiff and the town to the effect that he *would not be disturbed* in the exclusive possession of the premises and

improvements *unless the same should be totally destroyed by fire, or otherwise.* * * *

* * * The present complaint * * * *alleges* the existence of *contract rights* * * *. The *interest* disclosed in the present *pleading* is in the nature of a *leasehold.* * * * Appellant thus *pleads* not only an insurable interest * * *, but *an interest of the character described in the policy. His estate in the land was terminable on the contingency of the destruction of his buildings by fire.* * * *

* * * There is no glaring inconsistency between the *averments* of the pleading and the description in the *policy.* * * *

* * * Here, the appellant *seeks recovery on the policy as written* * * *.

* * * He is *not* asking for reformation. * * * *The appellant is entitled to an opportunity to make his proof.*"

In short, respondent's complaint alleges, as the factual basis of his claimed leasehold interest, that he was the successor in interest to the leasehold existing under Keil's "written agreement" (now "lost") with the former owner of the land entitling Keil as "lessee" of such former owner to "exclusive possession and use of the ground until such time as the improvements should be destroyed by fire, or otherwise"; and that the title acquired by the town in 1897 was taken subject to this agreement of lease. (Quotations in this paragraph are from the Circuit Court's second opinion, as quoted immediately above.)

The proof.

The record contains not a scintilla of evidence of any express agreement of lease ("lost" or not lost) to respondent, to Keil, or to anyone at all, for the term pleaded, or for any term whatever; nor of any "understanding" with the town or any of its officials that respondent "would not be disturbed" in his occupancy. It was shown only that, for some forty-five years, respondent and his predecessors occupied the improvements originally built by Keil on the beach property, from time to time made extensive additions to these improvements, and regularly paid a ground rent of three dollars monthly to Belvedere Land Company. [See, for a discussion of the evidence, the opinions of the trial Court (R. 60-3) and the Circuit Court (R. 366-74).]

The Circuit Court, after summarizing the evidence in some detail, reached this conclusion (R. 372):

> **"Here, through the monthly payment and acceptance of rent, a month-to-month tenancy existed."**

QUESTIONS PRESENTED AND REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

I.

IS IT WITHIN THE APPROPRIATE FUNCTION OF AN APPELLATE COURT TO REVERSE A JUDGMENT ADMITTEDLY CORRECT (UNDER THE PLEADINGS, EVIDENCE, AND LAW OF THE CASE), FOR THE SOLE REASON THAT ANOTHER TRIAL MIGHT RESULT DIFFERENTLY IF THE LOSING PARTY AMENDS HIS PLEADINGS TO RELY UPON A NEW AND DIFFERENT THEORY OF RECOVERY?

The opinion of the Circuit Court fails to disclose any particular in which error was supposedly committed by the trial Court. [The only errors noted in the opinion (R. 370) occurred in the first opinion rendered by the Circuit Court itself (77 Fed. (2d) 157). These, we submit, can furnish no proper basis for the decision of reversal; more particularly since, although these changes of position by the Circuit Court might (and no doubt would) be of importance upon a new trial, they are in no sense basically involved in the decision of reversal.]

The trial Court committed no error.

That it was necessary for respondent in his complaint to allege the factual basis of his claimed leasehold interest, is elementary. In any event, he did so; **alleging** that he succeeded by purchase to an *express lease running for a term delimited by destruction of the improvements.*

Admittedly, there was **no proof** of this or any other lease for a term. *The most that the Circuit Court undertakes to spell out from the evidence is a month-to-month tenancy.*

The trial Court decided the case on the theory that respondent, to recover, must prove what he alleged. As the Circuit Court significantly says (R. 374):

> "*Understandably enough,* the case was decided below on the theory that to entitle appellant to recover he must prove an express lease for a term commensurate with the life of his structures."

Clearly, this was not only "understandable"; it was inevitably correct. As has been said by the Supreme Court many times: the proofs and the allegations must agree; a party can no more succeed upon a case proved but not alleged, than upon a case alleged but not proved; the examination of a case by the Court is confined to the issues made by the pleadings.

The issues tried have been chosen by respondent. His first complaint was held defective by the Circuit Court. He has since progressed to his fourth complaint, and admittedly has failed to prove essential allegations thereof. Although the facts proved as to the extent of respondent's "leasehold" interest were substantially the same at the last trial as they were at the first trial which occurred nearly seven years ago (R. 62), the Circuit Court has now ordered that he be given an opportunity to file a fifth complaint to conform to proof which he first made in 1933, thus necessitating a third trial and perhaps additional appellate proceedings.

It is the function of an appellate tribunal to correct error; not to create it. Inasmuch as a substantial departure in proof from the factual basis or theory of liability alleged is fatal, the Circuit Court's decision

of reversal means, in practical effect, that no possible disposition of the cause by the trial Court could have withstood an appeal.

The prejudice to petitioner is apparent. Relying upon the issues as chosen by respondent, petitioner withdrew and waived (R. 338) affirmative defenses of concealment and misrepresentation, of a mutual assumption of both contracting parties proving false, and of rescission.

Moreover, **on the merits,** the decision of the trial Court is unassailable. In his complaint respondent alleged that his leasehold interest arose by virtue of a *lease for a term expiring only on destruction of the improvements* (Par. II; R. 2-11); that *this* was the leasehold interest the parties intended to insure, and that when he applied for the insurance he "stated" to petitioner "and otherwise caused it to be fully advised of all of the matters and things set forth in paragraph II", to-wit, *that he had a lease for a term running until destruction of the improvements* (Par. III; R. 11-14). **Since, therefore, by express allegations of respondent, the parties contracted with reference to an express lease for a term, it is difficult to see how the existence of a month-to-month tenancy could justify recovery under the policy, either at law or in equity.**

We submit that, in reversing an admittedly correct judgment solely to permit the unsuccessful litigant to "mend his hold" and try again, the Circuit Court has so far departed from the accepted and usual course of judicial procedure as to call for an exercise of this Court's power of supervision.

II.

IS A MONTH-TO-MONTH TENANCY A "LEASE" OR "LEASEHOLD INTEREST" WITHIN THE MEANING OF THOSE WORDS IN A POLICY OF LEASEHOLD FIRE INSURANCE?

After deciding that the evidence showed that respondent had only a month-to-month tenancy, the Circuit Court proceeded to construe the policy contract and determine the meaning of the words "lease" and "leasehold", concluding (R. 373):

> "The definition of these terms appears to embrace, in effect, any agreement whether express or implied, which gives rise to the relationship of landlord and tenant."

This definition, presumably, would embrace a month-to-month tenancy, as well as a tenancy at will (R. 373).

To reach this conclusion the Circuit Court applied to these words "the niceties of legal reasoning and terminology", thereby indulging in a process expressly disapproved by this Honorable Court in *Aschenbrenner v. United States Fidelity & G. Co.*, 292 U. S. 80, 54 S. Ct. 590, 78 L. Ed. 1137.

The words "lease" and "leasehold" are plain terms, with a well understood meaning in ordinary, popular, daily usage. They are clear and unambiguous.

They mean that there is in existence between lessor and lessee a definite arrangement as to the **duration** *of the tenancy* **for a fixed or determinate period,** *known as the term.*

This meaning has been universally recognized by Courts and lexicographers. Even the law dictionaries

distinguish this usual and popular significance, imported by common speech, from the technical legal definition which was applied by the Circuit Court. *Indeed, it may be fairly said that the primary thought behind the use of "lease" or "leasehold" is the reference to something* **other than a tenancy from month-to-month or at will.** When the man in the street speaks of a tenancy from month-to-month or at will, he talks of "renting", not "leasing"; conversely, when he talks of a "lease" or a "leasehold interest", he definitely does *not* refer to a month-to-month tenancy.

Insurance contracts, like other contracts, are to be understood in their plain, ordinary, and popular sense, rather than according to the strict legal meaning of the words used. This rule is universal. As a canon of interpretation it is a part of the statute law of California (*California Civil Code,* Sec. 1644). It has been iterated and reiterated by this Court and by the Courts of California.

Leasehold insurance is an important and rapidly growing branch of the insurance business. In a leasehold insurance policy, the words "lease" and "leasehold" are, obviously, of primary importance. They should not be given a different meaning by the Courts than that which everyday usage has always assumed them to have. If they are to be construed to embrace whatever can be compressed within the broadest lawyer's definition that can be found in a legal dictionary, it must be because an ambiguity lurks within them which insurers have neither suspected nor observed.

The construction of these words as used in a contract of leasehold insurance is a matter of general importance which has not been but should be settled by this Court, especially since the subject is one of first impression so far as we are aware.

THIS COURT MAY NOW FINALLY DISPOSE OF THE ENTIRE CAUSE.

For all practical purposes the decision of the Circuit Court of Appeals is a final judgment; it settles all questions of law involved in respondent's right of recovery under the policy, leaving only subordinate questions of fact for decision.

This cause has been in the Courts for years. There have been two trials in the District Court, three appeals to the Circuit Court, and this is petitioner's second prayer for certiorari. Nevertheless, there was no conflict in the evidence at either trial as to the nature of respondent's alleged leasehold interest; the evidence at both trials was substantially the same in this respect. As the trial Court said (R. 62):

> "A careful examination of the exhibits and the transcript will show that the facts of this case and the evidence produced at this trial are precisely the same as they were at the termination of the first trial. Plaintiff has merely repeated the earlier testimony in more elaborate form; he has added nothing which would enable the court to discover a lost leasehold agreement."

If this writ issues as prayed, and the questions of law are determined as petitioner contends, a final judg-

ment may now be entered and no further proceedings will be necessary in any Court.

In any event, and although the Circuit Court has remanded the case for a new (third) trial, the issuance of the writ is necessary to prevent extraordinary inconvenience and embarrassment to your petitioner in the conduct of the cause, for the reasons noted.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding said Circuit Court to certify and send to the Supreme Court, for its review and determination, a full and complete transcript of the record and all proceedings in the case entitled and numbered as above; that the judgment of said Circuit Court be reversed by this Honorable Court; and that your petitioner have such other and further relief in the premises as may seem proper.

Dated, San Francisco, California,
July 30, 1940.

ROYAL INSURANCE COMPANY, LTD.,
Petitioner,

By PERCY V. LONG,
Attorney for Petitioner.

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